

General Order No. 97-19

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS**

**GENERAL ORDER ADOPTING FIFTH CIRCUIT MODEL EQUAL EMPLOYMENT
OPPORTUNITY AND EMPLOYMENT DISPUTE RESOLUTION PLAN**

In accordance with the order of the Judicial Council of the Fifth Circuit dated October 24, 1997, the attached "Fifth Circuit Model Equal Employment Opportunity and Employment Dispute Resolution Plan" is hereby ADOPTED. This plan shall be effective for complaints filed on or after January 1, 1998.

Signed this _____ day of November, 1997.

FOR THE COURT:

RICHARD A. SCHELL
Chief Judge

FIFTH CIRCUIT MODEL EQUAL EMPLOYMENT OPPORTUNITY AND EMPLOYMENT DISPUTE RESOLUTION PLAN

**Adopted by the Fifth Circuit Judicial Council
October 24, 1997**

CHAPTER I - GENERAL PROVISIONS

§ 1 Preamble

This Plan shall be known as the Fifth Circuit Model Equal Employment Opportunity and Employment Dispute Resolution Plan ("Model EEO/EDR Plan").

Under EEO, the Judicial Conference of the United States has directed that each court adopt a plan in conformance with the national policy of providing equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age (at least 40 years of age at the time of the alleged discrimination), or disability. Each court will promote equal employment opportunity through a program encompassing all facets of human resource management, including recruitment, hiring, promotion, and advancement. This program does not modify or reduce the qualification standards for employment established in the federal court system.

Under EDR, the Judicial Conference has directed that this Plan provide to all court employees the rights and protections comparable to those provided to legislative branch employees under the Congressional Accountability Act of 1995.

Each court of the Fifth Circuit shall implement its EEO/EDR plan by either adopting this model Plan or submitting a modified plan for approval by the Judicial Council. A copy of each plan and any subsequent modifications shall be filed with the Circuit Executive and with the Administrative Office. Each court shall submit an annual report on the implementation of its plan to the Administrative Office for inclusion in the Director's Annual Report to the Judicial Conference.

Policies adopted by individual courts pertaining to adverse action or general grievance proceedings not invoking the rights and protections afforded under this EEO/EDR Plan are not affected. Further, local policies relating to rights enumerated under the Plan that are not inconsistent with the rights and procedures established herein are not affected.

The Model EEO/EDR Plan is not intended to duplicate the protections provided for the resolution of complaints of judicial misconduct or disability under 28 U.S.C. § 372(c) but is

intended to be the exclusive remedy of employees relating to rights enumerated under the Plan.

§ 2 Scope of coverage

This Plan applies to all circuit, district, bankruptcy, and magistrate judges of the United States courts in the Fifth Judicial Circuit, as well as to all employees of the said courts.

§ 3 Definitions

For purposes of this Plan--

- A. The term "employee" includes all individuals listed in Section 2 of this Chapter, as well as applicants for employment and former employees, except as provided below. The term "employee" does not include externs, applicants for bankruptcy judge or magistrate judge positions, private attorneys who apply to represent indigent defendants under the Criminal Justice Act, criminal defense investigators not employed by federal public defenders, volunteer counselors or mediators, or other individuals who are not employees of an "employing office" as that term is defined below.
- B. The term "employing office" includes all offices of the United States courts of appeals, district courts, and bankruptcy courts, including the offices of the circuit executive, federal public defenders, clerks of court, chief probation officers, chief pretrial services officers, staff attorneys, chief settlement conference attorneys, circuit librarians, and any such offices that might be created in the future. The court is the employing office of a judge's chambers staff.
- C. The term "court" refers to the unit containing the employing office responsible for redressing, correcting, or abating the violation alleged in the complaint. In the case of disputes involving federal public defenders, the term refers to the court of appeals.

**CHAPTER II. EQUAL EMPLOYMENT OPPORTUNITY
AND ANTI-DISCRIMINATION RIGHTS**

§ 1 General - Discrimination against employees based on race, color, religion, sex, national origin, age (at least 40 years of age at the time of the alleged discrimination), and disability is prohibited.

§ 2 Definition - The term "disability" means--

- A. a physical or mental impairment that substantially limits one or more of the major life activities of an employee,

B. a record of such an impairment, or

C. being regarded as having such an impairment. *See 42 U.S.C. § 12102(2).*

§ 3 **Special provision for probation and pretrial services officers** - The age discrimination provision of Section I of this Chapter shall not apply to the initial hiring of probation and pretrial services officers. See Report of the Proceedings of the Judicial Conference of the United States (March 1991), pp. 16-17.

§ 4 **EEO Implementation** - All court unit heads must ensure that all vacancies are publicly announced to attract candidates representing the make-up of persons available in the qualified labor market and all hiring decisions are based solely on job-related factors. They should make reasonable efforts to see that the skills, abilities, and potential of each employee are identified and developed, and that all employees are given equal opportunities for promotions by being offered, when the work of the court permits and within the limits of available resources, cross-training, reassignments, job restructuring, special assignments, and outside job-related training. Judges and court managers must apply EEO practices and policies. This includes giving all employees fair and equal opportunity to demonstrate their skills and, where those abilities exceed general performance standards, to be recommended for personnel actions and awards recognizing such achievements. As resources permit, training programs may be provided to enable employee development of job skills.

§ 5 **Personnel Practices** - Each court unit will: (a) seek qualified applicants reflecting the make-up of all such persons in the relevant labor market and publicize all vacancies; (b) make hiring decisions strictly upon an evaluation of a person's qualifications and ability to perform satisfactorily the duties of the position; (c) promote employees according to their experience, training, and demonstrated ability to perform duties of a higher level; (d) seek, insofar as reasonably practicable, to improve the skills and abilities of its employees through cross-training, job restructuring, assignments, details, and outside training.

§ 6 **EEO Evaluations** - Each court unit will prepare a brief report describing its efforts to provide equal employment opportunity in --

A. Recruitment. Each court unit will describe efforts made to bring a fair cross-section of the available pool into its applicant pool, including listing all employment sources and the methods used to publicize vacancies.

B. Hiring. Each court unit will identify recruitment efforts resulting in the hiring of a cross-section of the pool available and will, if known, explain those instances where members of the cross-section did not accept employment offered.

C. Promotions. Each court unit will list promotional opportunities, analyzing the distribution thereof, and describing those promoted to supervisory positions.

- D. Advancement. Each court unit will describe the efforts made to improve the skills and abilities of employees through cross-training, job restructuring, assignments, details, and outside training.

In addition, this evaluation should include information on factors inhibiting achievement of EEO objectives such as a lack of vacancies and minimal numbers of qualified applicants in the relevant labor market. This report also will include a breakdown according to the race, sex, color, national origin, and disability of the court's personnel on forms to be provided by the Administrative Office. The report will cover personnel actions occurring in the year ending September 30 and will be submitted by November 1 of each year.

- § 7 **EEO Objectives** - Each court unit will develop annual objectives reflecting those improvements needed in recruitment, hiring, promotions, and advancement, and will prepare a specific plan explaining how those objectives are to be achieved.
- § 8 **Annual EEO Report** - Each court will prepare an annual report on complaints, for the year ending September 30, reflecting: (a) the number filed; (b) the types according to race, sex, color, national origin, religion, age, or disability; (c) the number resolved, identifying the stage at which each was resolved. The annual report will not identify the names of the involved parties. The report will be available to the public upon request.

CHAPTER III. SEXUAL HARASSMENT

- § 1 **General** - Sexual harassment of any employee is prohibited.
- § 2 **Definition** - Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical contact of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- § 3 **Complaints against court employees** - A complaint of sexual harassment against any court employee shall be processed in accordance with Chapter IX of this Plan.
- § 4 **Complaints against judges** - A complaint of sexual harassment against any judge may be filed as a complaint of judicial misconduct pursuant to 28 U.S.C. § 372(c), or under the internal procedure presented below.

Internal Procedure - The complaint must be in writing, must allege all relevant facts constituting the basis for such complaint, and must specify the relief requested. The

complaint must be filed within six months of a particular act or occurrence unless good cause is presented and accepted by the chief judge receiving the complaint. If the subject of the complaint is a district, bankruptcy, or magistrate judge, the complaint shall be filed with the chief district judge. If the subject of the complaint is a circuit judge, the complaint shall be filed with the chief circuit judge. Upon receipt of the complaint, the chief judge will:

- A. make any investigation into the matter deemed necessary;
- B. consult with involved parties and seek an informal resolution of the problem; and
- C. prepare a report to the parties identifying the issues, describing the chief judge's findings and recommendation, and explaining what resolutions, if any, will be undertaken.

CHAPTER IV - FAMILY AND MEDICAL LEAVE RIGHTS

- § 1 **General** - Title II of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2611, applies to court employees in the manner prescribed in Volume I-C, Chapter X, Subchapter 1630.1, Section R, of the Guide to Judiciary Policies and Procedures.

CHAPTER V - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION RIGHTS

- § 1 **General** - No "employing office closing" or "mass layoff" (as defined in Section 2 of this Chapter) may occur until the end of a 60-day period after the employing office serves written notice of such prospective closing or layoff to employees who will be affected. This provision shall not apply to an employing office closing or mass layoff caused by non-appropriation of funds.

§ 2 **Definitions**

- A. The term "employing office closing" means the permanent or temporary shutdown of a single site of employment for 50 or more full-time employees during any 30 day period.
- B. The term "mass layoff" means a reduction in force which--
 - 1. is not the result of an employing office closing; and
 - 2. results in an employment loss at the single site of employment during any 30-day period for
 - a. (1) at least 33 percent of the full-time employees; and

(2) at least 50 full-time employees; or

b. at least 500 full-time employees. *See 29 U.S.C. § 2101.*

CHAPTER VI - EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

§ 1 **General** - An employing office shall not discriminate against an eligible employee or deny an eligible employee reemployment rights or benefits under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq.

CHAPTER VII - OCCUPATIONAL SAFETY AND HEALTH PROTECTIONS

§ 1 **General** - Each employing office shall provide to its employees a place of employment which is free from recognized hazards that cause or are likely to cause death or serious physical harm to employees. Judges and court unit heads shall insure that hazards in court space are brought to the attention of the respective landlord (General Services Administration, U.S. Postal Service, or private lessor) for correction.

CHAPTER VIII - POLYGRAPH TESTS

§ 1 **General** - No employee may be required to take a polygraph test.

CHAPTER IX - DISPUTE RESOLUTION PROCEDURES

§ 1 **General procedure for consideration of alleged violations** - An employee who claims a denial of the rights granted under Chapters II through VIII of this Plan shall seek resolution of such claims through the procedures of this Chapter. The procedural process consists of:

- A. counseling and mediation;
- B. hearing before the chief judge of the court (or a designated judge) in which the alleged violation arises; and
- C. review of the hearing decision under procedures established by the Judicial Council.

§ 2 **General provisions and protections**

- A. Prohibition against retaliation - Complainants under this Plan shall be free from retaliation, coercion, or interference because of filing a complaint pursuant to this Plan. Likewise, any person who participates in the filing or processing of a complaint, such as an employment dispute resolution coordinator, mediator, witness, representative, or co-worker, also is entitled to freedom from retaliation.
- B. Right to representation - Every individual invoking the dispute resolution procedures of this Plan may be represented by a person of his or her choice if such person is available and consents to be a representative. A court employee may serve as a representative if it will not unduly interfere with assigned duties or constitute a conflict of interest, as determined by the representative's appointing officer. Similarly, every respondent to a complaint is entitled to representation in the same manner as complainants.
- C. Case preparation - To the extent feasible, every individual invoking the dispute resolution procedures of this Plan may use a reasonable amount of official time to prepare the case, so long as it does not unduly interfere with the performance of official duties.
- D. Extensions of time - The chief judge of the court, or designee, may extend any of the deadlines set forth in this Chapter for good cause.
- E. Records - At the conclusion of formal and informal proceedings under this Plan, all papers, files, and reports will be filed with the court's Employment Dispute Resolution Coordinator ("EDR Coordinator"). No papers, files or reports relating to a dispute will be filed in any employee's personnel folder, except as necessary to implement an official personnel action.

§ 3 Designation and duties of employment dispute resolution coordinator - Each court shall designate a person to serve as the EDR Coordinator. Courts may designate more than one EDR Coordinator. The duties of such person shall include the following:

- A. to provide information to the court and employees regarding the rights and protections afforded under this Plan;
- B. to coordinate and organize the procedures and establish and maintain official files of the court pertaining to complaints and other matters initiated and processed under the court's EDR plan;
- C. to coordinate the counseling of individuals in the initial stages of the complaint process, in accordance with Section 5 of this Chapter; and
- D. to collect, analyze, and consolidate statistical data and other information pertaining to the court's EDR process.

§ 4 General disqualification provision - Each court and Judicial Council shall make available

procedures through which a party may seek the disqualification of a judge, employee, or other person involved in a dispute under this Chapter.

§ 5 Counseling

- A. Initiating a proceeding; formal request for counseling - An employee who believes that his or her rights under Chapters II through VIII of this Plan have been violated must first request counseling.
- B. Form and manner of requests - Requests for counseling:
 - 1. are to be submitted to the court's EDR Coordinator;
 - 2. must be made in writing; and
 - 3. must be made within 30 days of the alleged violation or within 30 days of the time the employee becomes aware of the alleged violation.
- C. Procedures
 - 1. Who may serve as counselor - The counseling shall be conducted by the court's EDR Coordinator, unless the EDR Coordinator is disqualified from serving as counselor under Section 4 of this Chapter, or is otherwise unavailable. In such instances, the chief judge of the court shall designate another qualified individual to perform the counseling function. If the dispute involves an alleged violation of this Plan by a judge, the person who conducts the counseling shall be a judge designated by the chief judge.
 - 2. Purposes of counseling - The purposes of the counseling shall be to discuss the employee's concerns and elicit information regarding the matter which the employee believes constitutes a violation; to advise the employee of his or her rights and responsibilities and the procedures of the court applicable to the employment dispute resolution process; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.
 - 3. Confidentiality - All counseling shall be kept confidential unless the employee agrees in writing to waive confidentiality of the counseling process for the purpose of allowing the designated counselor to contact the employing office or to attempt a resolution of the disputed matter. A written record of all such contacts must be kept by the counselor and made available for review by the affected person(s).

4. Form of settlement - The EDR Coordinator shall reduce to writing any settlement achieved during the counseling process and secure the signatures of the employee, his or her representative, if any, and the member of the employing office authorized to enter into settlement on the employing office's behalf.
- D. Duration of counseling period - The period for counseling shall be 30 days (or a shorter period if counseling is concluded at an earlier date), beginning on the date that the request for counseling is received by the EDR Coordinator.
- E. Conclusion of the counseling period and notice - The EDR Coordinator shall notify the employee in writing of the end of the counseling period. As part of the notice, the EDR Coordinator shall inform the employee of the right and obligation, should the employee choose to pursue a claim, to file with the EDR Coordinator a request for mediation in accordance with Section 6 of this Chapter.

§ 6 Mediation

- A. Initiation - Within 15 days after receiving the notice concluding the counseling period, the employee may file with the EDR Coordinator a request for mediation. The request must be in writing, stating the claim(s) presented. Failure to pursue mediation will preclude further processing of the employee's claim under any other provisions of this Chapter.
- B. Procedures -
 1. Designation of mediator - As soon as possible after receiving the request for mediation, the EDR Coordinator shall designate a mediator and provide written notice of such designation.
 2. Who may serve as mediator - Any person with the skills to assist in resolving disputes, except the court's EDR Coordinator, may serve as a mediator under this Plan. If the complaint alleges that a judge has violated the rights protected by this Plan, the mediator shall be a judge designated by the chief judge.
 3. Purpose of mediation - The mediator shall meet separately and/or jointly with the employee and his or her representative, if any, and the employing office to discuss alternatives for resolving a dispute, including any and all possibilities of reaching a voluntary, mutually satisfactory resolution.
 4. Confidentiality - Any person or party involved in the mediation process shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties. A written record of all such contacts must be kept and made available for review by the affected

person(s). In addition, in the event the employee files a complaint pursuant to Section 7 of this Chapter, the hearing officer shall have access to the record of any claims raised in mediation.

5. Form of settlement - The mediator shall reduce to writing any settlement achieved during the mediation process and secure the signature of the employee, his or her representative, if any, and the member of the employing office authorized to enter into settlement on the employing office's behalf.
- C. Duration of mediation period - The mediation period shall be 30 days (or a shorter period if mediation is concluded at an earlier date), beginning on the date the request for mediation is received. The employee is required to attend at least one mediation session. Thereafter, he or she may proceed to file a complaint.
- D. Conclusion of mediation period and notice - If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the EDR Coordinator shall provide the employee, the employee's representative, if any, and the employing office with written notice that the mediation period has concluded. The notice also shall inform the employee of the right to file a complaint under Section 7 of this Chapter.

§ 7 Complaint, review and hearing

- A. Complaint - Not later than 15 days after receiving the notice concluding the mediation period, an employee may file a complaint under procedures established by the court. The complaint shall be in writing, shall identify the complainant and all involved parties and individuals, and shall set forth a short and plain statement of the complainant's claim and the relief or remedy being sought. The respondent shall be the employing office responsible for redressing, correcting, or abating the violations alleged in the complaint. No individual shall be named as a respondent in the complaint.
- B. Review of pleadings
 1. Reviewing official - The complaint and any other documents shall be reviewed by the chief judge of the court, or by another judge designated by the chief judge. In the event the chief judge is disqualified under Section 4 of this Chapter, or is unavailable to serve under this subsection, the reviewing official shall be designated in accordance with procedures established by the court. In the case of a complaint alleging that an Article III judge has violated rights protected by the Plan, that judge may elect to have a hearing conducted by a judge of another court, as designated by the Judicial Council. Any designation of a judge from another court to hear and decide the case shall be arranged by agreement of the chief judges of the affected courts. In the case of recusal of a judge for any other reason, a replacement judge will be named by the chief judge of the circuit.

2. Review procedures - After notice to the complainant and an opportunity to respond, the chief judge or designee may dismiss in writing any complaint that is found to be frivolous, unduly repetitive of a previous complaint, that fails to state a claim upon which relief may be granted, or that makes claims that were not advanced in mediation.

C. Hearing procedures

1. Hearing officer - If the chief judge or designee does not dismiss the complaint under the preceding subsection, the chief judge or designee, acting as the hearing officer, shall hold a hearing on the merits of the complaint unless he or she determines that no material factual dispute exists.
2. Specific provisions - The presiding judge may provide for necessary discovery and investigation. In general, the presiding judge shall determine the time, place, and manner of conducting the hearing. However, the following specific provisions shall apply to hearings conducted under this Section:
 - a. the hearing shall be commenced no later than 60 days after the filing of the complaint;
 - b. the complainant and the head of the office against which the complaint has been filed must receive written notice of the hearing; such notice also shall be provided to the individual alleged to have violated rights protected by this Plan;
 - c. at the hearing, the complainant will have the rights to representation, to present evidence on his or her behalf, and to cross-examine adverse witnesses; the employing office will have the rights to representation, to present evidence on its behalf, and to cross-examine adverse witnesses;
 - d. a verbatim record of the hearing must be kept and shall be the sole official record of the proceeding;
 - e. in reaching a decision, the chief judge or designee shall be guided by judicial and administrative decisions under the laws related to Chapters II through VIII of this Plan and by decisions of the Judicial Council under Section 8 of this Chapter;
 - f. remedies may be provided in accordance with Section 9 of this Chapter where the hearing officer finds that the complainant has established by a preponderance of the evidence that a substantive right protected by this Plan

has been violated;

- g. the final decision of the chief judge or designee must be issued in writing not later than 30 days after the conclusion of the hearing; and
- h. all parties, or any aggrieved individual, shall have the right to written notice of any action taken as a result of a hearing.

§ 8 Review of decision - A party or individual aggrieved by a final decision of the chief judge or designee, or by a summary dismissal of the complaint, may petition for review of that decision under procedures established by the Judicial Council of the circuit. Any review will be conducted by a judge or judges, based on the record created by the hearing officer, and shall be affirmed if supported by substantial evidence.

§ 9 Remedies

- A. Where judges acting pursuant to section 7 or 8 of this Plan find that a substantive right protected by this Plan has been violated, they may order a necessary and appropriate remedy. A remedy may be directed at correcting a past violation, prospectively insuring compliance with the rights protected by this Plan, or both. A remedy shall be tailored as closely as possible to the specific violation involved.
- B. Remedies provided to successful complainants under this Plan may include, but are not limited to:
 - 1. placement of an employee in a position previously denied;
 - 2. placement in a comparable alternative position;
 - 3. reinstatement to a position from which previously removed;
 - 4. prospective promotion to a position;
 - 5. priority consideration for a future promotion or position;
 - 6. back pay and associated benefits, including attorneys' fees, where the statutory criteria of the Back Pay Act, 5 U.S.C. § 5596, are satisfied;
 - 7. records modification and/or expungement;
 - 8. "equitable" relief, such as temporary stays of adverse actions;

9. granting of family and medical leave; and
10. accommodation of disabilities through the purchase of specialized equipment or the restructuring of duties and work hours.

C. Remedies not legally available include:

1. payment of attorneys' fees (except as authorized under the Back Pay Act);
2. compensatory damages; and
3. punitive damages.

§ 10 Record of final decisions - Final decisions under this Plan shall be made available to the public in accordance with procedures established by the Judicial Council of the circuit.